



**CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS**

350 McAllister Street, Room 1144A

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CJEO Draft Formal Opinion No. 2015-008

ATTENDING PARTISAN POLITICAL FUNDRAISING EVENTS

Comments from the Public Submitted with a Waiver of Confidentiality

Comments from members of the public submitted in response to an Invitation to Comment on a CJEO Draft Formal Opinion are confidential communications to the committee that may not be disclosed unless confidentiality is affirmatively waived (Cal. Rules of Court, rule 9.80(h)(3); CJEO Rules, rule 5(b)(1), (e)).

The following are the comments received by the committee on CJEO Draft Formal Opinion 2015-008 that were submitted with a statement waiving confidentiality or consenting to disclosure.

From: David Rothman
Sent: Sunday, September 06, 2015 4:40 PM
To: Black, Nancy
Subject: Judges attending Political events.

I found only one small thing that should be fixed.

Page 8 refers to the "Title" to canon 5. The language at the commencement of Canons 1 through 5 are not just the title to the canon, but the canon itself. See second sentence in paragraph 2 on page 3. Thus the language of the "title" is the essence of the canon, with the "subparts" enunciating numerous details.

"The code consists of broad declarations called canons, with subparts, and a terminology section."

The Opinion is excellent and necessary.

David Rothman

From: David Rothman
Sent: Tuesday, September 08, 2015 12:52 PM
To: Black, Nancy
Subject: Re: Judges attending Political events.

I have no objection to posting my comments. . . .

David

To: Committee on Judicial Ethics Opinions
Re: Comment Re: Draft Formal Opinion 2015-008
From: Barbara Kronlund, Superior Court Judge, San Joaquin County

9/9/15

Dear Justice Robie and Members of CJEO:

I generally agree with Draft Formal Opinion 2015-008 and I appreciate the direction from the Committee in this area which can be confusing for judges to navigate. Some judges are under the mistaken belief that they can have no political ties and are prohibited from even attending political gatherings. I am happy to see the Draft Opinion dispel such misperceptions. Overall, I think this is a useful Opinion which provides good, practical advice.

And while I agree that judges should educate their friends, families, and acquaintances about the Canons and ethical restraints facing judges, particularly in the political arena, I think this Opinion goes too far in its conclusion that “Because judges have an affirmative obligation to guard against the impermissible use of their judicial titles, when accepting an invitation to attend an event, judges should inform promoters of the restrictions on the use of judges’ names..” (Conclusions, page. 23, 3rd ph.)

The problem I have with this particular aspect of the Draft Opinion is that it requires a huge leap from Canon 2B(2), that a judge shall not lend the prestige of judicial office or use the judicial title in any manner to advance the pecuniary or personal interests of the judge or others, to place an affirmative duty on judges who attend political gatherings to inform promoters of the restrictions on the use of judges’ names. The Opinion acknowledges that nowhere in the Canons is there an express obligation on judges who are not candidates for judicial office to inspect promotional material used for political fundraising events they are attending. In Section E at pg. 20, the Opinion jumps to the conclusion that “several canons provide guidance regarding a judge’s implicit duties under the code” which then is interpreted as a preemptive obligation to inspect promotional material for political events. I don’t see a sufficient nexus between Canon 2B(2) and the off-chance that the judge will become an unwitting endorser for political fundraising to warrant placing this burden on the judge as a prerequisite to attendance at a political event.

The Opinion goes further, stating, “When accepting an invitation to attend an event, judges should clearly advise the event organizers of the restrictions placed on their attendance under the Code of Judicial Ethics. (Pg. 21, 2nd ph.) This would include an advisement against being publicly introduced or otherwise being identified in promotional materials for the event.” This proactive approach is not required under the Canons and is not necessary. It seems presumptuous to expect that a judge’s attendance at a political event would be used for promotion of an event, except for one venued in a more intimate setting such as in someone’s home. In that circumstance, the judge likely knows the organizers and should be on alert that they must discuss ethical restraints on the use of the judge’s name to promote the activity, the same as occasioned by attendance at any other intimate fundraising event. But the judge has no general duty as far as nonpolitical fundraisers to assure the

judge's name is not used for fundraising or promoting private interests, absent some special relationship with the organizers or special circumstances surrounding the particular event.

The Opinion states, "Although the Code does not place an affirmative duty on judges to review and approve promotional materials after accepting an invitation to attend a partisan political fundraising event, a request to do so would eliminate the necessity of taking corrective action after the judge's name has been used without consent." (Pg. 21, 3rd ph.) There is clearly no obligation under the Canons to support this well-meaning advice that then becomes the gold standard which judges hereafter are expected to abide by. No doubt this is indeed one way to avoid the problem of having to take corrective action after having one's name used improperly, but so is a strict prohibition on attendance at any political event; and that's not mandated by the Canons either and likewise should not be the best practice suggested in a Formal Ethics Opinion.

My experience during my 20 years on the bench is that I can recall one time, back 15-20 years ago, that a judge on my bench had to take corrective action after his/her name appeared on a political announcement. I see that the Draft Opinion cites to only one CJP Report as an example of a judge being disciplined for failing to seek a retraction for an unauthorized political endorsement, and what strikes me about the example used is that it is from a 1997 Annual Report of the CJP. That's 18 years ago. I researched the CJP discipline cases to locate similar violations and I believe there is only one other, and that is where a judge's name appeared as a sponsor on a political mailing for a nonjudicial candidate, in CJP, Annual Rept. (1986), Advisory Letter, p.4. That discipline was imposed 29 years ago!

I think it's fair to conclude that this section of the Draft Opinion seeks to fix a problem that isn't really a problem at all. If and when a judge finds themselves needing to take corrective action over a political endorsement situation, Judge Rothman's Conduct Handbook along with a call to the CJA Ethics Hotline will provide ample direction on how to ethically proceed. But rather than taking a preemptive strike and requiring judges to undertake what I think could be a tremendous burden, this is better handled with corrective measures in the very rare and unlikely instance that this scenario actually occurs.

I urge CJEO to remove Section E from the Draft Opinion for the reasons stated herein. If CJEO believes it is necessary to include the duty to take corrective action following a judge's discovery that their name has been used without consent, I have no objection to that part of the Opinion remaining.

Thank you for considering my comments. I waive confidentiality and consent to CJEO's public disclosure of my comment.

Respectfully Submitted,

Barbara A. Kronlund



CALIFORNIA JUDGES ASSOCIATION

The Voice of the Judiciary

October 14, 2015

Nancy A. Black
350 McAllister Street,
Room 1144A
San Francisco, California 94102-3688

Re: CJA Judicial Ethics Committee Proposed Comments on CJEO Draft Formal Opinion 2015-008
("Attending Partisan Political Fundraising Events")

Dear Ms. Black

The CJA Judicial Ethics Committee ("Committee") submits the following proposed comments on Draft Formal Opinion 2015-008 of the California Supreme Court Committee on Judicial Ethics Opinions ("CJEO"), entitled "Attending partisan political fundraising events," for consideration by the CJA for submission to the CJEO.

I. Background

On September 3, 2015, the CJEO issued its Draft Formal Opinion 2015-008 ("Draft Opinion"), and invited comments to be submitted by October 23, 2015. The CJEO summarizes its Draft Opinion as follows:

"CJEO Draft Formal Opinion 2015-008 provides guidance to judges on attending and speaking, appearing as a guest of honor, or receiving an award at a partisan political event where a nonjudicial candidate will be endorsed or funds will be raised. The opinion also provides advice concerning these activities when the judge is a candidate for judicial office. . . . [T]he opinion discusses steps judges may take to avoid the improper use of judicial title in promotional materials for political fundraising events they may be attending."

The Committee believes that the Draft Opinion provides a thoughtful analysis to the difficult issues that may be posed when a judge attends, speaks at, or receives an award at an event hosted by a political organization or nonjudicial candidate. However, the committee strongly believes that the Draft Opinion, as written, would constrain judges beyond what is required by the Code of Judicial Ethics in a manner that limits a judicial officer's obligation under Canon 4B to engage in judicial outreach "to contribute to the improvement of the law, the legal system, and the administration of justice" and Canon 5's provisions that judges "are entitled to entertain their personal views on political questions" and "are not required to surrender their rights or opinions as citizens."

We propose that CJA submit the comments set forth below that would urge the CJEO to modify the Draft Opinion to reflect more accurately the restrictions imposed on judges by the Code of Judicial Ethics.

II. The Proposal

We propose to submit the following comments to the CJEO:

We appreciate the thoughtful analysis of the difficult issues addressed in Draft Formal Opinion 2015-008 (“Draft Opinion”) with respect to “Partisan Political Fundraising Events.” However, we have a concern that the opinion, as drafted, constrains judges beyond what is required by the judicial Canons¹ in a manner that limits a judicial officer’s obligation under Canon 4B to engage in judicial outreach “to contribute to the improvement of the law, the legal system, and the administration of justice” and Canon 5’s provisions that judges “are entitled to entertain their personal views on political questions” and “are not required to surrender their rights or opinions as citizens.” We appreciate this opportunity to comment, and discuss our concerns below.

1. Lack of Consistent and Clear Defined Terminology

While the title of the Draft Opinion refers to the subject of “Attending Partisan Political Fundraising Events,” we are concerned that the opinion uses a range of terms to describe “political” gatherings without defining those terms. These include the terms “partisan political event” (Section IV.A, pp. 9, 14), “partisan event” (Section IV.B. at p. 9), “political gathering” (Section IV.C., at p. 10, Section VI, at p. 23), “partisan political event” (Section IV.C., at p. 11), “political event” (Section IV.C. at pp. 14, 16-17, Section VI, at p. 23), and “partisan political organization” (Section VI, at p. 22). We urge the Committee to use consistent terminology and to define the terminology.

In Section III (“Authorities”), p. 4 the Draft Opinion cites to the definition of “political organization” used in the “Terminology” preface to the California Code of Judicial Ethics to mean “a political party, political action committee, or other group, the principal purpose of which is to further the election or appointment of candidates to nonjudicial office.” We urge the Committee to make clear that the Draft Opinion uses this definition of “political organization” in the opinion.

We note that the Draft Opinion is very clear in Section IV.A. on page 8 in which it states that “Canon 5(A) prohibits judges from making speeches for a political organization or candidate for nonjudicial office, publicly endorsing or opposing a candidate for nonjudicial office, or personally soliciting funds for a political organization or nonjudicial candidate.” This language is clear because it uses the phrase in the Canons referring to a “political organization or candidate for nonjudicial office.”

By contrast, however, on page 9, in the last full paragraph of section IV.A, the Opinion discusses a judge’s activities at a “partisan political event” and a “partisan political fundraising event.” The first full sentence reads: “The committee has been asked to discuss the types of activities that are permissible at a partisan political event where a nonjudicial candidate will be endorsed or funds will be raised” (Draft Opinion, at p. 9.) The second sentence states that “[t]his opinion provides

¹ All further reference to the Canons are to the California Code of Judicial Ethics.

guidance to judges on the circumstances in which they may . . . appear as the guest of honor or receive an award at a partisan political fundraising event.” (*Id.*) Similarly, in section C.1, on page 11, the Draft Opinion poses the question: “The question is, under what circumstances might attendance at a partisan political event create the appearance of a personal solicitation or a public endorsement?”

The phrases “partisan political event” and “partisan political fundraising event” are used elsewhere in the Draft Opinion. For example, in Section VI entitled “Conclusions,” the Draft Opinion states: “When judges accept an invitation to speak about the law, the legal system or the administration of justice *at a partisan political event*, steps should be taken to prevent, and must be taken to correct the impermissible use of judicial title to endorse or fundraise in promotional materials.” (Draft Opinion at p. 23, emphasis added.) The Draft Opinion on page 11 also states as to a “political gathering” that “it is the committee’s opinion that attendance would be prohibited if the judge’s presence could reasonably be construed as a public endorsement.”

We urge the Committee to define these terms consistent with the Code of Judicial Ethics. A “partisan political event” or “political gathering” should be defined as “an event hosted by a political organization as that term is defined in the ‘Terminology’ section of the Canons or nonjudicial candidate at which a nonjudicial candidate will be endorsed or funds will be raised for a nonjudicial candidate.”² Absent this definition, the Draft Opinion could be interpreted to mean that a judge cannot attend a League of Women Voters or National Political Woman’s Caucus forum at which “political” issues are discussed even where the sponsoring organization would not be defined as a “political organization” under the Canons and neither endorses a specific candidate nor raises funds for a specific candidate. We assume there would be no prohibition on the judge attending a forum sponsored by one of these organizations, and speaking on current sentencing laws for drug offenders, yet without further clarification, the Draft Opinion could be read to prohibit attendance or making a speech because the event could be considered a “political gathering” or “political event.”

Restrictions on Judge’s Mere Presence at Fundraising Events

We are also concerned with the broad statement in the Draft Opinion that a judge’s mere presence at a fundraising event for a political candidate would in some circumstances be impermissible. For example, Section C.1 states: “If the purpose of the event is to raise funds and endorse a specific candidate, a judge’s presence at a small gathering could reasonably be understood as a public endorsement, or as lending judicial prestige to the candidate.” (Section C.1, at pp. 13-14.) While the Draft Opinion cites to Canons 2B(2) and 4C(3)(iv) to support this broad restriction, limiting the ability of a judge merely to attend the event appears to go further than what is mandated by the Canons. Canon 2B(2) provides that a “judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others.” Canon 4C(3)(iv) similarly provides that a judge “shall not permit the use of the prestige of his or her judicial office for fundraising or membership solicitation. . . .”

The Draft Opinion appropriately restricts the activities of a judge in using his or her title, making a speech, or soliciting funds in a manner that would violate these two Canons, but nowhere do the Canons prohibit a judge from merely attending a political event in his or her individual capacity.

² The Committee may also want to request that the Advisory Committee on the Code of Judicial Ethics add these definitions to the “Terminology” section of the Canons.

Indeed, Canon 5 provides: “Judges and candidates for judicial office are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens.” The only additional restriction in Canon 5 is that judges “shall, however, not engage in political activity that may create the appearance of political bias or impropriety.” We urge the Committee to delete the language prohibiting mere attendance at a partisan political event absent a specific activity that violates the Canons.

Footnote 4 Advising “Exceptional Caution for Fundraising Event for District Attorney and Similar Candidates

The Draft Opinion states in footnote 4 on page 13: “The committee advises exceptional caution in deciding whether to attend a fundraising or endorsement event for a nonjudicial candidate that has a special relationship to the courts, such as a district attorney, a public defender, a city attorney or a sheriff.” The footnote concludes: “A judge should carefully consider whether attendance at even a large gathering in these circumstances might give rise to a reasonable perception of partiality or the appearance of an endorsement.” No citations are given for this bold premise that a judge should exercise “exceptional caution” before attending even a large gathering in this context. No support is given for this severe blanket restriction on a judge’s rights, as opposed to the more nuanced approach in the text as to other gatherings where the judge is cautioned not to take actions that would otherwise violate the Canons. We urge that this footnote be removed.

Obligation to Inspect Promotional Materials for Political Events

We are particularly concerned about Section IV.E entitled, “Obligation to Inspect Promotional Material for Political Events.” We urge the Committee to modify the language on page 21 that states: “When accepting an invitation to attend an event, judges should clearly advise the event organizers of the restrictions placed on their attendance under the Code of Judicial Ethics. This would include an advisement against being publicly introduced or otherwise being identified in promotional materials for the event.” This language as currently drafted imposes an obligation on the judge that goes beyond what may be necessary in an individual case. We urge the Committee to tailor the admonition to reflect the type of event and the likelihood that the judge would be publicly introduced or identified in the promotional materials.

If, for example, a judge receives a printed invitation at his or her home address that is directed to the judge by name (i.e., addressed to Jane Smith, not Judge Jane Smith) and the event is for a large fundraiser, it should be unnecessary for the judge to take steps to contact the organizer of the event to make sure he or she would not be introduced at the event or referenced in any promotional materials. Indeed, making this inquiry would not only be unnecessary, but potentially awkward and burdensome. By contrast, if the judge is personally invited to a small political fundraiser for a nonjudicial candidate at someone’s home, there is a greater likelihood that the judge would be introduced or otherwise connected to the event. While the area in between these extremes may be gray, ultimately the test should be whether the judge believes that accepting the invitation would likely result in the organizers of the event introducing the judge or noting in any promotional materials that the judge would be attending.

This tailored approach would more closely track the discussion of the circumstances under which attendance at a partisan political event may create the appearance of a personal solicitation or a public endorsement, which subject is discussed in the draft starting on page 11. The Draft Opinion

appropriately suggests that these circumstances will depend on the size of the group being solicited and the proximity of the judge to a person soliciting others for donations. (See Section C.1, at p. 13.). We urge the Committee to use similar language when describing a judge's obligation to inform sponsors of a partisan political event (appropriately defined) not to introduce the judge or use the judge's name in any promotional materials.

In addition, in this section on page 21, we are concerned about the language that reads: "Although the Code does not place an affirmative duty on judges to review and approve promotional materials after accepting an invitation to attend a partisan political fundraising event, a request to do so would eliminate the necessity of taking corrective action after the judge's name has been used without consent." (Section IV.E, at p. 21.) While it is true that the obligation to take corrective action is mandatory, this language could be interpreted to place on the judge an affirmative obligation with respect to any political fundraising event to search out the promotional materials to insure that the judge's name is not used improperly on the invitation. We urge the Committee to modify this language to limit the obligation to search out promotional materials to the narrow situation where there is a small gathering and the judge believes that the hosts of the event would be likely to list the judge as a host or attendee at the event. However, placing this obligation on a judge who attends a large political fundraiser by a political organization would be impractical and not warranted by the circumstances.

Similarly, in section VI ("Conclusions"), an obligation is placed on the judge, as follows: "when accepting an invitation to attend an event, judges should inform promoters of the restrictions on the use of the judges' names and, when necessary, take reasonable corrective action." As noted above, this is impractical and not required for a large political fundraising event where there would be no reasonable expectation that the judge would be introduced or listed in any improper way.

Restriction on Judge Speaking to the Law and Legal System

The Draft Opinion in Section II at p. 3 states: "If a judge decides to attend and speak [at political gatherings], he or she must restrict his or her remarks to the law, legal system, or administration of justice" In Section VI ("Conclusions") on page 23, the Draft Opinion states as to a "political gathering": "If the judge concludes that he or she can accept the speaking invitation, the judge must restrict his or her remarks to the law, the legal system, and the administration of justice" First, as noted above, the term "political gathering" needs to be defined more clearly. In addition, there is no basis for restricting a judge's remarks to the law, the legal system and the administration of justice. The Draft Opinion appears to restrict the judge from speaking about an even non-political topic. For example, this language would prohibit David Rothman from speaking about painting or political cartooning (about each of which he was proficient) when he was a sitting judge. Despite his talent and knowledge on both those topics, this broad language would have prevented him from speaking about such non-political subjects.

We urge that this language be removed or modified to allow a judge to speak about non-political topics. For example, the sentence could be modified to read: "If a judge decides to attend and speak [at political gatherings], the judge should not include in his or her remarks endorsement or solicitation of funds for a nonjudicial candidate or political organization or any comments that would give the appearance of endorsement or solicitation of funds for a nonjudicial candidate or political organization." In language in Section VI ("Conclusions") on page 23 could be similarly modified to read with respect to a "political gathering": "If the judge concludes that he or she can accept the

speaking invitation, the judge should not include in his or her remarks endorsement or solicitation of funds for a nonjudicial candidate or political organization or any comments that would give the appearance of endorsement or solicitation of funds for a nonjudicial candidate or political organization.”

Restrictions on Judges Receiving an Award

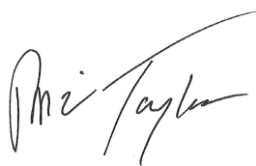
The Draft Opinion states in Section C.3 at page 17 that “judges are free to accept awards from specialty bar organizations or other interest groups, so long as doing so does not give the appearance of favor or constitute improper political activity or fundraising.” This language appears to restrict the judge’s acceptance of an award beyond what is required by the Canons of Ethics, which allow a judge to “be a . . . guest of honor, or recipient of an award for public or charitable service provided the judge does not personally solicit funds . . .” (Canon 4C(3)(d)(iv).)

It is common that judges being honored at non-political events, such as the “Judge of the Year” functions given by many non-profit and professional organizations, are presented with a “proclamation” attesting to the virtues of the honoree. Typically, these are presented by, or on behalf of district attorneys and sheriffs, as well as by elected boards and councils and other officeholders. Significantly, the honoree will have no idea who is going to present what proclamation at the event. It is unclear whether the Draft Opinion intends to prohibit such awards and, if it does, this is overly broad and would in practice prevent a judge from ever accepting an award.

We urge the Committee to limit the restrictions on acceptance of an award to a “political event,” which as discussed above should be defined as an event where “a nonjudicial candidate will be endorsed or funds will be raised for a nonjudicial candidate.” Any restriction on acceptance of an award other than Canon 4’s prohibition on personal solicitation of funds goes beyond what is required and would be impractical.

Thank you for the opportunity to present this proposal. If you have any questions, the Committee would be happy to answer them.

Very truly yours,

A handwritten signature in black ink, appearing to read "Eric Taylor", written in a cursive style.

Eric C. Taylor, President

Online submission:

Friday, October 23, 2015 – 06:35

Draft Formal Opinion: Attending Partisan Political Fundraising Events Draft Formal Opinion: 2015–008

Name: James Dabney

Comment:

This opinion should not be released without substantial rewriting.

It is unclear from reading the opinion what the scope of this opinion is.

Does it apply to any event where a candidate speaks? It should be clear that this opinion concerns only events sponsored by a political organization as defined in the code. In this respect, and others throughout the opinion, little effort is made to tie the language used in the opinion to the Code of Judicial Ethics. Indeed there are portions of the opinion that seem to ignore the express language of the Code and create new and unsupported restrictions on a judge's political activity. For example, suggesting it would be improper for a judge to attend a political event where that judge's attendance would create an appearance of an implied endorsement by using language such as "reasonably be construed as an endorsement," goes beyond the requirements of the Code, which is to avoid actions that would constitute an "express" endorsement. Using the commentary from Canon 4 to justify a position inconsistent with the express language of Canon 5 and its commentary makes no sense. To conflate the two in this manner in effect, rewrites the Code. By doing so, the committee exceeds its mandate by rewriting the Code rather than applying the Code to a particular factual situation. This opinion needs to be pulled or substantially revised.

Waiver of Confidentiality: Yes

COMMENTS ON PROPOSED CHANGES

RESPONDING COURT:

Los Angeles Superior Court Ethics Review and Comment Committee
111 N. Hill Street,
Los Angeles, Ca. 90012

Name: Anthony Mohr, Chair

☐ **Agree** with proposed changes
☐ **Do not agree** with proposed changes
☒ **Agree** with proposed changes only if modified

SUBJECT: CJEO DRAFT FORMAL OPINION 2015 – 008

We support the effort by the California Supreme Court Committee on Judicial Ethics Opinions (“CJEO”) in Draft Formal Opinion 2015-008 (“Draft Opinion”) to provide guidance to judges on what limits are imposed on a judge’s attendance at certain “political” events, speeches at the events, and acceptance of awards. However, we have serious concerns that, as drafted, the opinion imposes far greater restrictions on a judge’s activities than otherwise imposed by the California Code of Judicial Ethics, with significant negative consequences for the judge and the judicial system. We urge the Committee to modify the Draft Opinion to provide clearer consistent definitions of terms used in the opinion and to conform the language to impose only those restrictions required by the canons.

We address each of our concerns below.

Comment 1: The use of undefined terms may lead to unintended consequences including the imposition of broader prohibitions than those intended by the Draft Opinion and chilling of judges’ fulfillment of their judicial outreach obligations and exercise of their First Amendment rights. This can be remedied by: (1) defining the term “political” and (2) restricting the opinion to attendance at events hosted by political organizations for the purpose of soliciting donations or endorsements of candidates for nonjudicial office.

The Draft Opinion and “Invitation to Comment” use a variety of terms to describe the type of events at which judicial attendance and speech is prohibited. The terms are not defined. The opinion does not define the terms it uses. (E.g., “a partisan political event” (Draft Opin. pp. 1, 2), “political event” (Draft Opin. pp. 1, 2), “political gathering” (Draft Opin. pp. 2, 3), “partisan event” (Draft Opin. p. 3), and “political fundraising events” (Invitation to Comment p. ii). The word “partisan event” is described as including any “activities designed to further . . . political issues.” (Draft Opin. p. 9.) Also, many other words containing the word “political” or synonyms are used, including “political organization” (Draft Opin. pp. 2, 3), “partisan candidate or party” (Draft Opin. p. 2), “political candidate” (Draft Opin. p. 3), “political activity” (Draft Opin. p. 8), “political bias” (Draft Opin. p. 8), “political impropriety”

(Draft Opin. p. 8), and “activities designed to further their political issues [of “political groups]” (Draft Opin. p. 9.).)

We urge the Committee to use a single term (e.g. “political event”) and to define it consistent with the ‘Terminology’ section of the Canons as an event hosted by “a political party, political action committee, or other group, the principal purpose of which is to further the election or appointment of candidates to nonjudicial office.”

Moreover, as the Draft Opinion implies, its rule is intended to govern attendance only at events “where a nonjudicial candidate will be endorsed or funds will be raised.” (Draft Opin. pp. 1, 2.) The opinion should state this expressly.

Without a precise definition of “political event” or a limitation to events where nonjudicial candidates will be endorsed or funds raised, the Draft Opinion could be read to prohibit a judge from asking the Open Courts Coalition to urge “politicians” such as the governor and legislators to adopt new legislation designed to improve the administration of justice.

This lack of definition may result in unintended consequences.

First, judges may attend events sincerely believing they may do so, only to find that they have inadvertently violated the rules of ethics because of differences in how they and others interpret the foregoing terms.

Second, the lack of clear definitions may have the inadvertent consequence of discouraging judges from fulfilling their affirmative duties concerning judicial outreach and education, which are encouraged in Canons 4B, 4C and 5.

Third, the lack of clear definitions may chill judges’ exercise of their First Amendment rights. This would contravene Canon 5’s specific acknowledgement that: “[j]udges and candidates for judicial office are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens.”

Finally, we are concerned that vague terminology will fail to give adequate due process notice.

We understand that the intent of Draft Formal Opinion 2015 – 008 is to address attendance at events hosted by “political organizations” (as defined in the “Terminology” section of the Code), and more particularly, events hosted by “political organizations” for the purpose of soliciting donations or endorsements for candidates for non-judicial office. (Draft Opin. pp. 2, 3.) These concerns would be addressed if this intent were stated expressly and the Draft Opinion were limited in scope to participation at such events.

Comment 2: The Draft Opinion imposes greater prohibitions on attendance at events than is proscribed by the canons and commentary on which the opinion is based.

As written, the Draft Opinion does not give adequate weight to Canon 5’s recognition of a judge’s First Amendment rights, Canon 4B’s encouragement of judicial outreach as to the

law and the administration of justice, or Canon 4C's authorization of various judicial outreach and educational activities.

As noted above, Canon 5 emphasizes that "[j]udges and candidates for judicial office are entitled to entertain their personal views on political questions" and "[t]hey are not required to surrender their rights or opinions as citizens." The importance of these sentences seems evident because of their placement: they are the first two sentences of Canon 5.

Canon 4B imposes a duty on judges to engage in judicial outreach as to the law and the administration of justice. Judge Rothman's Judicial Conduct Handbook characterizes the following Advisory Committee comment to Canon 4B as evidence that "a judge has a duty to help educate the public." (Rothman sec. 10:00, p. 522.) "As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of the substantive and procedural law and improvement of criminal and juvenile justice. To the extent time permits, a judge may do so, either independently or through a bar or judicial association or other group dedicated to the improvement of the law." (Advisory Committee comment to Canon 4B.)

The Draft Opinion's view that mere attendance at an event, without more, would violate the canons of ethics, is inconsistent with Canon 5's preservation of a judge's basic constitutional rights of assembly, association and speech. For instance, a candidate might simply attend the event to learn about the candidate, or to learn what an opponent's positions are. Surely, such mere attendance, without more, is protected.

In addition, the Advisory Committee comment cited by the Draft Opinion as justification for the rule that mere attendance may be prohibited does not support that conclusion. The cited Advisory Committee comment states: "Although attendance at political gatherings is not prohibited, any such attendance should be restricted so that it would not constitute an express public endorsement" (Draft Opin. p. 10.) This comment makes clear that mere attendance is *not prohibited*. Rather, attendance should be "restricted," as necessary.

Such restrictions might include not being introduced as a judge or at all, not wearing a name tag identifying the judge as a judicial officer, not giving any speeches, not expressing support for the candidate verbally, not standing in a position near the candidate or touching the candidate in a way that suggests an endorsement or solicitation, and a plethora of other "restrictions" on activities or speech that otherwise might raise mere attendance to an express endorsement or solicitation.

The Draft Opinion also conflicts with the Advisory Committee comment because, unlike the comment, the opinion is not limited to support so strong that it constitutes an "express" endorsement. Instead, the opinion proposes a vague and subjective standard that depends on what "a reasonable person might conclude" from the judge's mere attendance. For example, the opinion states in Section C.1 that "when deciding whether to attend a partisan political event, judges should consider the size and purpose of the event and whether attention will be drawn to their presence that will connect them as judges to fundraising by others *or that will reasonably be construed as an endorsement of a nonjudicial candidate.*"

(Draft Opinion, at p. 14, emphasis added.) This “reasonable person” standard is far more restrictive than the Advisory Committee’s “express” endorsement standard.

Use of a “reasonable person” standard also would be anomalous considering the judicial activities that are expressly permitted by law. For instance, judges are expressly permitted by law to make political contributions within certain pecuniary limits. These contributions are required by law to be published and are widely available to the public. If the test for whether a judge has made a public endorsement is whether the judge’s speech or act “can reasonably be construed as a public endorsement,” the judge would seem to be violating the rules set forth in the opinion just by writing a check that he or she knows will be publicized on the internet. The “reasonable person” test is likely to prohibit even judicial conduct that is allowable by law, such as this.

Use of a “reasonable person” standard also may conflict with Canon 4C. That canon allows judges to engage in a wide variety of activities concerning the administration of justice and the law. However, it may be controversial to take positions as to things like abortion, gay marriage and other hot button issues. The vociferous positions taken by candidates for public office on these subjects may be seen as properly labeling these as “political” issues. If a judge were to discuss the legal issues presented by gay marriage, for instance, a reasonable person might conclude that an activity authorized by Canon 4C constitutes speech as to a “political” issue, which is unethical as the opinion is now worded.

The “reasonable person” standard also fails to satisfy the strict scrutiny test required to justify restrictions upon First Amendment rights.

As to solicitation of campaign contributions, the Draft Opinion correctly recognizes that “a judge’s silent presence during solicitation by others is permitted.” (Draft Opin. p. 12.) Yet the opinion concludes that a judge’s attendance at a meeting where solicitation is made, without more (e.g., the judge’s “silent presence”), may constitute a solicitation or endorsement.³ The Opinion’s limitations on mere attendance go well beyond Canon 4C(3)(d)(i)’s prohibition that a judge may not “personally participat[e]” in solicitation. *The term “personally participate”* suggests an overt act that is not limited to merely attending a political event, especially if the judge “restricts” his or her attendance by preventing his or her identification as a judge at the event and engages in other “restrictions” discussed above.

A real world example of the problems the Draft Opinion might create is as follows. Some officials in the County of Los Angeles want to change the zoning in the Santa Monica Mountains to reduce the numbers of horses permitted to be stabled there. A group of affected horse owners opposes this. The group plans a fundraiser at which 135 supporters will pay \$11 each to attend the screening of an entertaining documentary film about horses. Is this a “political event”? Will a reasonable person conclude that a judge who merely attends, without being identified, has endorsed the group’s aims? What if, without explicit

³ By analogy, the provision allowing a judge’s silent presence during a solicitation supports the view that a judge’s silent presence at a gathering where endorsements are made, without more, is not an endorsement.

forewarning, someone stands up at the screening and solicits funds? Is the judge soliciting funds by being there?

Finally, the opinion's blanket prohibition of mere attendance at some functions, as well as the use of a "reasonable person" standard, does not recognize adequately a judge's duty to engage in judicial outreach as to the law and administration of justice. There may be a judicial outreach component in a judge's attendance at certain kinds of events that should not be chilled.

We urge the CJEO to specify that mere attendance, without more, does not constitute an endorsement or solicitation, and that the standard is whether the judge's other actions, coupled with his or her attendance, constitute an "express" endorsement or solicitation. The "reasonable person" standard should be discarded, and replaced with the word "expressly."

This higher threshold for reviewing a judge's behavior better balances a judge's right to attend political events and the responsibility to inform the public pursuant to Canons 4 and 5 against the risk that merely appearing at a public gathering will expose a judge to charges of ethical violations.

Comment 3: The prohibition of "any speech-making that reasonably gives the appearance of" support of a political organization suffers from the same deficiencies discussed above, in that it is overly broad and does not give sufficient weight to the canons' encouragement of judicial outreach or the canons' preservation of judges' constitutional rights.

The Draft Opinion concludes in Section C.2 that "any speech-making that reasonably gives the appearance" of, among other things, support of a "political organization" would be a violation of Canon 5, even though the subject of the speech is "the law, the legal system, or the administration of justice." (Draft Opinion, at pp. 16-17.) The opinion further states that "speech" that "can be understood as . . . implicitly" endorsing or soliciting funds would be prohibited." (Opin. p. 16.) It opines that a speech "devoted solely to the history of the law . . . given at a partisan political event" could be seen as impermissible under Canon 5A. (Opin. p. 16.)

For the reasons stated above, this portion of the opinion does not give adequate consideration to the duty imposed in Canon 4B to educate the public as to the law and the administration of justice. It also imposes an undefined, vague subjective test that will not give adequate due process notice to judges that their activities might violate the law. These provisions would fail the strict scrutiny test and chill the exercise of judges' First Amendment rights.

Comment 4: Footnote 4 advising "exceptional caution for fundraising event for district attorney and other elected officials involved in the legal system" should be deleted.

In footnote 4 (Opin. p. 13) of the Draft Opinion, "The committee advises exceptional caution in deciding whether to attend a fundraising or endorsement event for a nonjudicial candidate that has a special relationship to the courts, such as a district attorney, a public defendant, a

city attorney or a sheriff.” It further states that “[a] judge should carefully consider whether attendance at even a large gathering in these circumstances might give rise to a reasonable perception of partiality or the appearance of an endorsement.”

The footnote provides no legal citations supporting exceptional caution based on the nature of the office sought by the candidate. The language is inconsistent with the Draft Opinion’s more reasoned approach to gatherings involving other candidates. The warning articulated in the footnote is more expansive than any language in the Canons and will inevitably chill judges’ exercise of their First Amendment rights of assembly and free speech. The footnote should be deleted.

Comment 5: The Draft Opinion imposes a burdensome, mandatory and overly broad obligation to inspect promotional materials for “political events” before attending them.

The Draft Opinion (Opin. p. 21) states: “When accepting an invitation to attend an event, judges should clearly advise the event organizers of the restrictions placed on their attendance under the Code of Judicial Ethics. This would include an advisement against being publicly introduced or otherwise being identified in promotional materials for the event.”

As written, this language imposes an undue burden because it advises judges to investigate promotional materials for every event regardless whether the event is likely to involve the judge in political activities regulated by the Canons. If an invitation is to a large political fundraising event, gives the judge no indication that the inviting organization is even aware that he or she is a judge, and the judge has no reason to believe that the organization is aware of his or her status, it is unduly burdensome for the judge to find a knowledgeable person in the organization who can verify that the organization does not know he or she is a judge and that the organization has no intention to call attention to that fact.

By contrast, if the invitation is to a small fundraiser for a nonjudicial political candidate at a private home, it is reasonable to anticipate that the judge may be introduced or otherwise associated with the event. Under those circumstances, it is not unduly burdensome to recommend inquiry. The obligation to inquire should hinge on whether, considering the circumstances of the invitation and the nature of the event, the judge has reason to believe that the organizers are likely to make an introduction or publicize the judge’s status in promotional materials.

As noted in the Draft Opinion (Opin. p. 11), the nature of the event, the size of the group being solicited and the judge’s relationship, if any, to the persons actively soliciting donors are important factors affecting the reasonableness of making an inquiry. (See Section C.1, at p. 13.) The Committee should frame the judge’s obligation to notify the hosting organization in terms of these factors rather than impose a blanket obligation.

The disclaimer in the Draft Opinion (Opin. p. 21) that there is no “affirmative duty on judges to review and approve promotional materials after accepting an invitation to attend a partisan political fundraising event,” coupled with the comment that “a request to do so would eliminate the necessity of taking corrective action after the judge’s name has been

used without consent,” is troublesome. Together, they imply that the a judge should take affirmative investigatory action before attending any political fundraising event, regardless of whether there is any reason to believe that the inviting organization is aware of or intends to publicize the judge’s status. The same is true for the language in the Conclusions, advising that “when accepting an invitation to attend an event, judges should inform promoters of the restrictions on the use of the judges’ names and, when necessary, take reasonable corrective action.”

Comment 6: The Draft Opinion’s restrictions on awards should be limited to awards bestowed at events hosted by a “political organization” or by a nonjudicial candidate for office.

Under Canon 4C(3)(d)(iv), a judge may “be a . . . guest of honor, or recipient of an award for public or charitable service provided the judge does not personally solicit funds” (Canon 4C(3)(d)(iv).) The suggestion in the Draft Opinion (Opin. p. 17) that “judges are free to accept awards from specialty bar organizations or other interest groups, so long as doing so does not give the appearance of favor or constitute improper political activity or fundraising” is more restrictive than the Canons.

If adopted, the Draft Comment is likely to discourage acceptance of awards even though such awards enhance the prestige of the judiciary in accordance with Canon 2A. While a judge may know, in advance, that he or she will receive an award at a non-political event such as a bar association meeting, it may be awkward or impossible to ascertain whether a political official has been invited to participate in the award ceremony and even more difficult to divine whether receiving the award may “give the appearance of favor or constitute improper political activity” because, for example, an official participating in the award ceremony is coming up for election. As written, the Draft Opinion is likely to discourage or prevent a judge from accepting an award even though accepting the award is consistent with the judge’s duty to “[promote] public confidence in the integrity and impartiality of the judiciary” under Canon2A.

As noted above, the term “political event” should be defined as an event where “a nonjudicial candidate will be endorsed or funds will be raised for a nonjudicial candidate.”